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# In the Supreme Court of the United States

**OCTOBER TERM, 1948.**

## No. _____ and No. _____

**No. .....**

CARY R. ALBURN, Trustee under the Last Will and Testament of Charles H. Salmons, Deceased; JOHN C. LINCOLN; HELEN E. BING, Trustee of the Estate of Sol R. Bing, Deceased; and HENRY GEORGE SCHOOL OF SOCIAL SCIENCE, a Corporation,

PETITIONERS,

vs.

THE UNION TRUST COMPANY, a Corporation, East 9th Street & Euclid Avenue, Cleveland, Ohio; PAUL A. MITCHELL, Superintendent of Banks of the State of Ohio, in charge of the liquidation of The Union Trust Company; THE NATIONAL CITY BANK OF CLEVELAND, Trustee under Agreement and Declaration of Trust, dated August 15, 1924; UNION PROPERTIES, INC., a corporation; and HAROLD B. BURDICK, THE FIRST CENTRAL TRUST COMPANY, Trustee under the Deed of Trust of Frederick W. Work, HENRY W. MATHEWS, ALICE L. SCOTT, and RALPH STICKLE, Successor Trustee under the Will of Andrew J. Bause, Deceased,

RESPONDENTS.

**No. .....**

CARY R. ALBURN, Trustee under the Last Will and Testament of Charles H. Salmons, Deceased; JOHN C. LINCOLN; HELEN E. BING, Trustee of the Estate of Sol R. Bing, Deceased; and HENRY GEORGE SCHOOL OF SOCIAL SCIENCE, a Corporation,

PETITIONERS,

vs.

THE NATIONAL CITY BANK OF CLEVELAND, Successor Trustee under the Agreement and Declaration of Trust dated August 15, 1924; H. EARL COOK, Superintendent of Banks of the State of Ohio, in Charge of the Liquidation of The Union Trust Company; THE UNION TRUST COMPANY, a Corporation; UNION PROPERTIES, INC., a Corporation; and HAROLD B. BURDICK, THE FIRST CENTRAL TRUST COMPANY, Trustee under the Deed of Trust of Frederick W. Work, HENRY W. MATHEWS, ALICE L. SCOTT, and RALPH STICKLE, Successor Trustee under the Will of Andrew J. Bause, Deceased,

RESPONDENTS.

## PETITION FOR WRITS OF CERTIORARI.

For their petition, Cary R. Alburn, Trustee under the last will and testament of Charles H. Salmons, deceased, John C. Lincoln, Helen E. Bing, Trustee of the estate of

Sol R. Bing, deceased, and Henry George School of Social Science, a corporation, on behalf of themselves and all others similarly situated, by their attorneys, respectfully represent to this Honorable Court:

## STATEMENT OF THE CASE.

The parties in the two cases before this Court are identical. The central issue in both was the same,—whether a certain Agreement and Declaration of Trust was valid. Both were tried and decided together. The first action, entitled *Alburn, Trustee, etc., et al. vs. The Union Trust Co., etc., et al.*, in this Court, was instituted by the petitioners, as beneficiaries of the trust, asking for a declaratory judgment as to its validity. The second action, entitled *Alburn, Trustee, etc., et al. vs. National City Bank of Cleveland, Successor Trustee, etc., et al.*, in this Court, was subsequently filed by the Successor Trustee, asking for a decree quieting title. The facts are these:

The Union Trust Company, of Cleveland, Ohio, owned a parcel of land which had cost the bank $310,000. In 1924, it prepared and executed an Agreement and Declaration of Trust in which it declared itself trustee of the land. It then issued and sold to its trust customers and to various trust estates of which it was fiduciary, "land trust certificates" representing 2,000 undivided interests in the equitable ownership of the property. The purchasers of these certificates, who became the beneficiaries of the trust, and who now number about 200, paid for the trust property $2,005,906.53 (QTR 28, DJR 36-37).[1] In addition to

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[1] QTR means Record in Quiet Title action, *Alburn, Trustee, etc. et al. vs. National City Bank of Cleveland, Successor Trustee, etc. et al.*; DJR means Record in Declaratory Judgment action, *Alburn, Trustee, etc., et al. vs. The Union Trust Co., etc. et al.* Most of the facts are contained in the petitioners' amended petition in the Declaratory Judgment action, and amended cross petition in the Quiet Title action, the allegations of which are substantially identical. These facts were all admitted to be true by the demurrers of the respondents which were sustained by the Ohio courts.

the profit in excess of $1,695,000 derived by the bank in the sale of the property to its own trust, the bank reserved to itself, by the terms of the trust indenture, all net income of the trust property in excess of $110,000 annually, thereby realizing an additional profit of $10,000 per year (QTR 28, DJR 37). The trust indenture also provided an annual fee of $3,600 to the bank for administering the trust (QTR 28, DJR 37).

The Union Trust Company administered the trust until June 15th, 1933, when the Superintendent of Banks of the State of Ohio took possession of the assets and business of the bank for liquidation (DJR 35).

On October 31, 1933, National City Bank of Cleveland, as the result of an ex parte proceeding, became successor trustee and has administered the trust ever since (QTR 26, 29, DJR 38).

On April 24, 1935, the Supreme Court of Ohio, in the case of *Ulmer vs. Fulton*, 129 O. S. 323, 195 N. E. 557, held that such a trust was void, that title to the trust property never vested in the trustee but remained in the bank creating the trust and that the certificate holders were general creditors of the bank in the amount paid for the trust property. Severely condemning the banks which had devised these transactions, the court stated that they were contrary to the public policy of the state and were entirely beyond the statutory authority of trust companies; that no action or inaction of any of the parties thereto, no estoppel, could be asserted to give them any legal effect (QTR 29, DJR 38-39).[2]

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[2] The *Ulmer* decision was later confirmed by the Ohio Supreme Court in *Haggerty vs. Squire*, 137 O. S. 207, 28 N. E. (2d) 554 (1940), and uniformly followed by the lower courts. *Arend vs. Fulton, Supt.*, 53 Ohio App. 503, 5 N. E. (2d) 792 (1936), Motion to Certify overruled October 7, 1936; *Gallagher vs. Squire, Supt.*, 57 Ohio App. 222, 13 N. E. (2d) 373 (1937), Motion to Certify overruled October 27, 1937; *Grant vs. City Trust & Savings Bank*, 26 Ohio L. Abs. 227 (1937).

As a result of the *Ulmer* decision, the Superintendent of Banks, on June 17, 1935, issued a written directive to all open banks in Ohio ordering them to terminate such trusts promptly, restore the assets to the banks and pay the beneficiaries the amount paid for the assets. (This directive is set forth in full in QTR 30 and DJR 39.)

At the same time, the Superintendent of Banks filed suit to retrieve the assets of those invalid trusts which he had transferred out of liquidating banks to successor trustees, recognizing the beneficiaries as creditors of the banks.[3]

On August 3, 1936, in accordance with an agreement reached between them, the Superintendent of Banks sent a letter to the Successor Trustee stating that the case of *Ulmer vs. Fulton* had raised the question of the ownership of the property; that the rights and interests of the Superintendent of Banks and the certificate holders had not yet been determined; that until they were determined, the Successor Trustee could continue to administer the property without prejudice to the rights of any of the parties; that in the event it was "finally determined" that the property was an asset of The Union Trust Company, the superintendent would, under certain conditions, honor all leases. (This agreement is set forth in full in QTR 31-32 and DJR 40-41.)

Notwithstanding the Agreement of August 3, 1936, and the action taken by the Superintendent of Banks in all other such trusts, neither the Successor Trustee nor the Superintendent of Banks took any action to have the validity of this trust determined. The interests of the certificate holders required a determination of the validity of the trust for two compelling reasons:

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[3] *Arend vs. Fulton*, *supra*; *Gallagher vs. Squire*, *supra*; *Grant vs. City Trust & Savings Bank*, *supra*; *State ex rel. Squire vs. Central United National Bank, Trustee*, 20 Ohio L. Abs. 238 (1935); *State ex rel. Squire vs. National City Bank, Trustee*, 24 Ohio L. Abs. 160 (1936); *State vs. Krause*, Cuyahoga County Common Pleas, No. 431174 (1936).

(1) As long as he validity of the trust remained in doubt, the value and marketability of the trust property and the land trust certificates were seriously affected (DJR 42).

(2) If the trust were invalid, as it appeared to be, the beneficiaries had no interest in the property and their only recourse was against the bank, and since the bank was in the process of liquidation, a timely determination was necessary to enable the beneficiaries to participate in the assets of the bank before they were completely distributed.

Upon being appised of the facts, some of the petitioners and other beneficiaries of the trust, in 1942, filed a representative action, *Stanley et al. vs. Hart et al.*, the "Hart" case, to set aside the trust, for a money judgment against The Union Trust Company, and for a claim against the Superintendent of Banks in the amount of the judgment. By a three to three decision, the Supreme Court of Ohio, 142 O. S. 528, 53 N. E. 2d 197 (1944), affirmed the judgment of the Court of Appeals of Cuyahoga County, holding that under the McIntyre Act, Section 710-92a, Ohio General Code, effective April 21, 1937 (Appendix A), the certificate holders were barred from recovery as creditors of The Union Trust Company (QTR 5 and DJR 43-44). At the same time the Court *declined to adjudicate the validity of the trust* (QTR 5 and DJR 44), thereby still leaving the title to the trust property and to the land trust certificates in serious doubt

A group of beneficiaries, among whom were some of the petitioners herein, thereupon sought an adjudication of validity through a mandamus action filed in the Supreme Court, *Stanley et al. vs. Cook et al.*, 146 O. S. 348, 66 N. E. (2d) 207 (1946), the 'Cook" case, praying for a writ ordering the Superintendent of Banks to set the trust aside. The Supreme Court, by adivided decision, five to two, refused

to issue the writ and *again declined to determine the validity of the trust* (146 O. S. 359, DJR 71).

Ten years had now elapsed since the agreement between the Successor Trustee and the Superintendent of Banks was made, contemplating a determination of the validity of the trust. Neither had taken any action and both had effectively prevented the certificate holders from obtaining a determination, and the title of the certificate holders was still beclouded. The Union Trust Company had been in liquidation thirteen years. If the trust were invalid, it was necessary to have a determination before the assets of the bank were completely distributed; otherwise the certificate holders might lose both their property and any chance of recovering their purchase money.

On May 8, 1946, the petitioners filed, in the Common Pleas Court of Cuyahoga County, their action for a declaratory judgment, one of the two cases before this Court, praying for a determination of the validity of the trust. The Successor Trustee and the Superintendent of Banks demurred (DJR 26-27) and were joined, for the first time, by the Burdick group of certificate holders (DJR 28-29), some of whom had made separate settlements with the Superintendent of Banks (DJR 43).

On June 8, 1946, while the Declaratory Judgment action was pending, the Successor Trustee filed, in the same court, a petition to quiet title in which were named as defendants only the Superintendent of Banks, The Union Trust Company and Union Properties, Inc., who promptly filed disclaimers of any interest in the property.

The petitioners, not having been named as parties defendant nor even notified of the suit, but having chanced to learn of it, obtained leave, against the strenuous resistance of the Successor Trustee, to file an answer and cross petition (QTR 21, 1) on the ground that the Successor Trustee did not represent them on the issue of the validity of the trust and that they were necessary parties to a determination of that issue.

In their answer the petitioners generally denied the Successor Trustee's allegations (QTR 26), and in their cross petition they asserted the invalidity of the trust (QTR 27-33). The Burdick group of certificate holders also intervened, admitting the validity of the trust (QTR 49, 50, 7, 9-10).

The Successor Trustee filed a motion to strike the petitioners' answer on the ground that they were not necessary or proper parties (QTR 45-46) and all of the other parties, except the Superintendent of Banks and The Union Trust Co., demurred to the petitioners' cross petition (QTR 7, 9-10).

The Common Pleas Court sustained demurrers to all of the petitioners' pleadings in both cases asking for affirmative relief[4] and at the same time struck from the files the answer of the petitioners in the Quiet Title suit (QTR 10). It then issued a decree *pro confesso* quieting title in the Successor Trustee (QTR 6-11). No evidence was adduced. Although expelling the petitioners, who were beneficiaries of the trust, from the case and denying them a hearing, the court did not expel the other beneficiaries, who had taken a position contrary to that of the petitioners, and permitted them to participate in the hearing on the merits (QTR 6-11).

In addition to depriving the petitioners of any hearing, the court precluded them from *ever* having a hearing by enjoining them from asserting any claim inconsistent with the trustee's title, except on direct appeal (QTR 11).

In four separate lawsuits, litigated over a period of six years, the beneficiaries of the trust have been unable to obtain a judicial determination of the validity of the trust. In the first two suits, the *Hart* and *Cook* cases, the Ohio courts refused to rule on the issue of validity. In the

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[4] The court sustained the demurrers to the petition and amended petition in the Declaratory Judgment action (DJR 4-5) and to the amended cross petition in the Quiet Title action (QTR 9-10).

last two suits, the court held that the beneficiaries were not even entitled to a hearing and determined the question of validity without their participation, striking their answer in the Quiet Title suit and enjoining them from ever asserting their claim. The end result, after the many years of litigation, is that there still is not a judicial determination of validity.

While the Quiet Title decree impliedly determined the validity of the trust, it was rendered ineffectual, first, by the arbitrary expulsion of necessary parties from the hearing, and, secondly, by the court's own assertion, in its Opinion, that the validity of the trust was not involved and, therefore, not adjudicated (QTR 77, 81).[5]

In the meantime, the beneficiaries' property rights are still beclouded and insecure,—in a state of legal paralysis; and they are in jeopardy of losing both their property and their purchase money, for if there is no adjudication before The Union Trust Company is liquidated, they may eventually be confronted with a decision of invalidity with their only source of relief, the assets of The Union Trust Company, irretrievably gone.

## QUESTIONS PRESENTED.

1. In an action to quiet title brought by a trustee, involving the issue of the validity of the trust, certain beneficiaries denying the validity of the trust are granted leave to become parties defendant and to file an answer of general denial. Other beneficiaries, admitting the validity of the trust, are also granted leave to become parties. The court strikes the answer of the beneficiaries denying validity and expels them from the case, but permits the beneficiaries admitting validity to remain as parties. The

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[5] The Court of Appeals said in its Opinion: "Nothing in the petition to quiet title can be found requiring any adjudication of the validity of the trust" (QTR 77). And: "Accordingly, the court in these cases is not required to pass upon the validity or invalidity of the trust * * *" (QTR 81).

court then issues a decree *pro confesso*, quieting title in the trustee, thereby determining the validity of the trust, and further enjoins the beneficiaries who denied validity and were expelled from the case from asserting any claim contrary to the title of the trustee.

Is not the action of the court a deprivation of due process under the XIVth Amendment to the United States Constitution because it deprived the beneficiaries who asserted invalidity of any opportunity to be heard and enjoined them from bringing any further proceeding to assert their rights, at the same time granting to the trustee and beneficiaries who maintained validity the right to a hearing?

2. The validity of a trust is in serious doubt. If invalid, the beneficiaries have no equitable ownership of the property of the trust and their sole recourse is a claim for the purchase price of the property against the bank which created the trust, sold the property to the trust, and is now in liquidation. In a suit brought by the beneficiaries, the court has held that a three-month non-claim statute bars them from asserting claims as general creditors of the bank, but at the same time the court has refused to determine the validity of the trust, leaving insecure and doubtful the property rights of the beneficiaries and placing them in the jeopardy, in the event that the trust is eventually declared invalid, of losing both their property and the money paid for it. In three additional suits, the courts refused to determine the validity of the trust. Under such circumstances, are not the beneficiaries entitled, under the due process clause, to a hearing and judicial determination of the validity of their trust, so that (a) if the trust is valid, their property rights would be made secure and freely marketable, and (b) if the trust is invalid, the beneficiaries would have the opportunity to assert their claims against the bank before it is completely liquidated, and if the court should hold that the beneficiaries are entitled neither to their property nor to any recourse against the

bank by reason of the short non-claim statute, they may have the right to appeal to the Federal courts upon the constitutionality of the statute?

**BASIS OF THE JURISDICTION OF THE COURT.**

The jurisdiction of this Court is invoked under that portion of Section 1257(3) of the Judicial Code, 28 U. S. C. Sec. 1257(3), Act of June 25, 1948, 62 Stat. 869 which provides that final judgments or decrees rendered by the highest court of a state in which a decision could be had may be reviewed by this Court by writ of certiorari where any title, right, privilege or immunity is specially set up or claimed under the constitution of the United States.

In the Assignments of Error and briefs filed in the Court of Appeals of Cuyahoga County, to which the petitioners appealed from the judgments rendered in each case by the Common Pleas Court of said county, the petitioners alleged that the said judgments were in violation of the petitioners' rights to due process and equal protection of laws under the XIVth Amendment to the Constitution of the United States.[6]

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[6] In the Quiet Title action, the federal questions were raised by the 7th and 8th Assignments of Error filed in the Court of Appeals (QTR 59) and by Section IV-B (pp. 25-26) and Section IV-C-4 (pp. 36-37) of the Court of Appeals' brief (QTR 84-85) to which the 8th Assignment of Error referred. The petitioners contended that the XIVth Amendment was violated by the judgment of the Common Pleas Court:

(a) in that the petitioners' answer was stricken and they were denied a hearing (QTR 85),

(b) in that the court sustained the demurrers to their cross petition, thereby holding that the Successor Trustee could invoke the power of the court for the determination of the validity of the trust, whereas they, the beneficiaries, could not (QTR 84-85), and

(c) in that the court interpreted the McIntyre Act as barring them from an adjudication of their property rights (QTR 59).

(*Continued on following page*)

In affirming both judgments of the Common Pleas Court, the Court of Appeals decided that said judgments did not constitute a denial of the said provisions of the United States Constitution, whereupon the petitioners, in both cases, appealed as of right and filed motions to certify to the Supreme Court of the State of Ohio, the highest court of said State, in which they alleged that the judgments of the Court of Appeals should be reversed because they were in violation of the petitioners' rights to due process and equal protection of laws under the XIVth Amendment.[7]

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*(Continued from preceding page)*

In the Declaratory Judgment action the federal questions were raised by the 5th and 6th Assignments of Error filed in the Court of Appeals (DJR 48) and Section IV-C-4 (pp. 36-37) of the Court of Appeals' brief (DJR 84-85). The petitioners contended that the due process clause of the XIVth Amendment was violated by the judgment of the Common Pleas Court:

(a) in that the court sustained the demurrers to their amended petition, thereby holding that while the Successor Trustee could invoke the power of the court for the determination of the validity of the trust, the beneficiaries could not (DJR 84-85), and

(b) in that the court interpreted the McIntyre Act as barring them from an adjudication of their property rights (DJR 48).

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[7] In the Quiet Title action, the federal questions were raised in the Notice of Appeal (as of right) filed in the Supreme Court (QTR 62-64) and in the 6th and 7th Assignments of Error filed in said court (QTR 67-68). The petitioners contended that the judgment of the Common Pleas Court, as affirmed by the Court of Appeals, was in violation of the petitioners' rights to due process under the XIVth Amendment:

(a) in that the petitioners were deprived of a hearing on the merits of the validity or invalidity of the trust (QTR 63 and 67-68), and

(b) in that the court interpreted the McIntyre Act as depriving the petitioners of both their property and purchase money (QTR 68).

In the Declaratory Judgment action, the federal questions were raised in the Notice of Appeal (as of right) filed in the

*(Continued on following page)*

The Supreme Court of Ohio overruled the motions to certify and dismissed the appeals as of right on the ground that no debatable constitutional questions of law were involved, 150 O. S. 357, Ohio Bar, 11-22-1948 (QTR 16-17 and DJR 9). The petitioners filed applications for rehearing, alleging again that the judgments of the Common Pleas Court as affirmed by the Court of Appeals, constituted a denial of the said provisions of the United States Constitution (QTR 70-75 and DJR 56-59).

The Supreme Court denied both applications for rehearing on November 10, 1948 (QTR 17 and DJR 9).

**REASONS FOR ALLOWANCE OF THE WRITS.**

In holding that the judgments of the lower courts in the two cases did not, in any respect, deprive the petitioners of their right to due process under the XIVth Amendment of the United States Constitution, the Ohio Supreme Court decided federal questions of substance. The judgments deprived the petitioners, whose rights were directly involved, of any hearing on the issue of the validity of the trust; enjoined them from ever having a hearing upon the issue; and left their property rights so doubtful and insecure that their value and marketability were seriously affected and, in fact, subjected to the jeopardy of total loss for the reason that the trust might be declared invalid after complete liquidation of the bank and all hope of recourse against it gone.

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*(Continued from preceding page)*

Supreme Court (DJR 51-52) and in the 5th and 6th Assignments of Error filed in said court (DJR 54-55). The petitioners contended that the judgment of the Common Pleas Court, as affirmed by the Court of Appeals, was in violation of their rights to due process under the XIVth Amendment:

(a) in that the petitioners were deprived of a hearing on the merits of the validity or invalidity of the trust (DJR 51-52 and 54), and

(b) in that the court interpreted the McIntyre Act as depriving the petitioners of both their property and their purchase money (DJR 55).

The decision of these federal questions by the Ohio Supreme Court are not in accord with the decisions of this Court holding:

(1) It is a denial of due process for a court to deprive a party of a hearing in the trial of a matter affecting his rights, by arbitrarily striking his answer from the files and issuing a decree *pro confesso* against him. *McVeigh vs. U. S.*, 78 U. S. (11 Wall.) 259, 20 L. Ed. 80 (1870); *Windsor vs. McVeigh*, 93 U. S. 274, 23 L. Ed. 914 (1876); *Hovey vs. Elliott*, 167 U. S. 409, 42 L. Ed. 215, 17 S. Ct. 841 (1897),

(2) It is a denial of due process for a court, while granting a hearing to some members of a class who maintain that an agreement is valid, to deny or fail to grant a hearing to other members of the same class who maintain the agreement is invalid. *Hansberry vs. Lee*, 311 U. S. 32, 85 L. Ed. 22, 61 S. Ct. 115 (1940); *McArthur vs. Scott*, 113 U. S. 340, 28 L. Ed. 1015, 5 S. Ct. 652 (1885); *Smith et al. vs. Swornstedt*, 57 U. S. 288 (16 How.) 14 L. Ed. 942 (1853),

(3) It is a denial of due process for a court to attempt to enforce a judgment which is void because a hearing has been denied to parties whose rights were affected by the judgment. *Hansberry vs. Lee, supra; Windsor vs. McVeigh, supra; McArthur vs. Scott, supra.* In the foregoing cases the courts attempted to enforce a void judgment by declaring it *res judicata* or entitled to full faith and credit. In the instant case, the court attempted to enforce the void quiet title decree by an injunction prohibiting the petitioners from relitigating the issue determined by the decree, and

(4) It is a denial of due process for the courts of a state to refuse or fail to accord a party any adequate remedy in which to enforce his legal rights. *Marino vs. Ragen*, 332 U. S. 561, 92 L. Ed. 203, 68 S. Ct. 240 (1947); *Brinkerhoff-Faris Company vs. Hill*, 281 U. S. 673, 74 L. Ed. 1107, 50 S. Ct. 451 (1930); *Lee Van Woods vs. Nierstheimer*, 328 U. S. 211, 90 L. Ed. 1177, 66 S. Ct. 996 (1945).

Although, in the Quiet Title action, the court issued a decree which, on its face, determined the validity of the trust, the court rendered the decree ineffectual by expelling the petitioners, who were necessary parties to a determination of validity, from the trial. The decree is, therefore, void and subject to collateral attack. (Cases cited in paragraphs 1 and 2 above.) If the decree were valid, it was further rendered ineffectual to determine the validity of the trust because the court expressly stated that the issue of validity was not involved (QTR 77). There has thus been a complete failure to determine the validity of the trust, leaving the property rights of the beneficiaries doubtful, insecure, and in peril.

WHEREFORE, the petitioners respectfully pray that writs of certiorari be issued, directed to the Supreme Court of Ohio, to review the decisions of the said court in the two above described cases, entitled in the Supreme Court of Ohio, "*Cary R. Alburn, Trustee, etc., et al., vs. The Union Trust Company, et al.,*" No. 31,524, and "*National City Bank of Cleveland, Successor Trustee, etc., et al. vs. H. Earl Cook, Superintendent of Banks of the State of Ohio, etc., et al.,*" No. 31,525; and that the petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

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## BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

### I.

### THE OPINIONS OF THE COURTS BELOW.

The Common Pleas Court delivered no opinion in the Quiet Title action. Its opinion in the Declaratory Judgment action is reported in 51 Ohio Law Abs. 65, 80 N. E. (2d) 721, and appears in DJR 60-82.

The Court of Appeals delivered a *per curiam* opinion covering both the Quiet Title and Declaratory Judgment actions. It was not reported but appears in QTR, pages 76-81, and DJR, pages 86-91. The Supreme Court wrote no opinion in either case, 150 O. S. 357, Ohio Bar, 11-22-1948.

An analysis of the opinions appears upon pages 26-29 of this brief.

### II.

### JURISDICTION.

The grounds upon which this Court has jurisdiction are set forth in the Petition, *ante*, pages 10-12.

### III.

### FACTS.

The facts are set forth in the part of the Petition entitled "Statement of the Case," *ante*, pages 2-8.

### IV.

### ARGUMENT.

The section of the Petition entitled "Reasons for Allowance of Writs," *ante*, pp. 12-14, is a summary of the following Argument.

**A. It Was a Denial of Due Process for the State Courts, in the Quiet Title Suit, to Have Stricken Petitioners' Answer, Issued a Decree by Default Against Them and Enjoined Them from Thereafter Asserting Their Rights. The Decision of the Ohio Supreme Court that Such Action Was Not a Denial of Due Process is in Conflict with Decisions of This Court.**

From the time the beneficiaries filed their first suit to determine the validity of the trust, the Successor Trustee was hostile to them because they asserted its invalidity, believing that under the *Ulmer* decision, which had declared such trusts opposed to public policy, the courts would have no alternative other than to adjudge it void.[8] On the other hand, the Successor Trustee contended throughout that it was its duty to maintain the validity of the trust, although a trustee is under no duty to a beneficiary to comply with an illegal trust and ordinarily he is under a duty not to comply. *Restatement of the Law of Trusts, American Law Institute*, Sec. 166.

So opposed was the Trustee to the petitioners that although it had failed for ten years to bring any action to determine validity, it resisted every effort of the petitioners in that direction. When, finally, the petitioners filed the Declaratory Judgment action, in which the controversy with the Successor Trustee was alleged (DJR 43), the Trustee sought to circumvent it by filing its own quiet

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[8] It is uniformly held that a court will not enforce an agreement that is void as against public policy and that even if the invalidity is not pleaded, the parties seek to waive invalidity or consent to its validity, it is the court's duty, *sua sponte*, to refuse to enforce it. *Coppell vs. Hall*, 74 U. S. (7 Wall.) 542, 558, 19 L. Ed. 244 (1868); *Oscanyan vs. Arms Co.*, 103 U. S. 261, 26 L. Ed. 539 (1880); *Morrill vs. Nightingale*, 93 Calif. 452, 28 Pac. 1068 (1892); *Richardson vs. Buhl*, 77 Mich. 632, 43 N. W. 1102 (1889); *Camp vs. Bruce*, 96 Va. 521, 31 S. E. 901 (1898); *Waychoff vs. Waychoff*, 309 Pa. 300, 163 A. 670 (1932).

title petition[9] without notifying the petitioners. The parties named as defendants in this action, The Union Trust Company, Superintendent of Banks and Union Properties, Inc., were *only those who admitted the validity of the trust.*

Under these circumstances, there could be no binding decree in the Quiet Title suit, determining the validity of the trust, unless the beneficiaries who had asserted invalidity were parties and given an opportunity to be heard.

> "In a suit in Equity brought by the trustee against a third person, the beneficiary ordinarily is not a necessary party, although he is a proper party. He is a necessary party only if a complete determination of the controversy cannot be had unless he is made a party, *as where the suit involves a controversy between the trustee and beneficiaries or a controversy among beneficiaries.*" (Italics supplied.) *Restatement of the Law of Trusts,* American Law Institute, Section 230-i. Also, *Bogert, Trusts and Trustees,* 1946, Section 593; *Perry on Trusts and Trustees,* 7th Edition, 1929, Section 873; *Commonwealth Trust Company vs. Smith,* 266 U. S. 152, 69 L. Ed. 219, 45 S. Ct. 26 (1924); *Shirk vs. Walker,* 298 Mass. 251, 10 N. E. (2d) 192 (1937); *Noel vs. Noel,* 173 Md. 152, 195 Atl. 315 (1937).

Where the validity of a trust is in question, all *cestuis* are necessary parties. *Hutchins vs. Security Trust and Savings Bank,* 208 Calif. 463, 281 Pac. 1026 (1929).

The Common Pleas Court had, in fact, held the petitioners were necessary parties by permitting them to inter-

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[9] In the Quiet Title petition, the Successor Trustee alleged that The Union Trust Company created the trust out of its own property, declared itself trustee and issued and sold certificates of equitable ownership in the property (QTR 18-21). These were the ultimate facts underlying the decision in *Ulmer vs. Fulton,* holding such trusts void and thus squarely raised the issue of the validity of the trust. The Successor Trustee also alleged that The Union Trust Company and the Superintendent of Banks, as its liquidator, asserted some claim in and to the property, which created a cloud upon the title of the Successor Trustee (QTR 21). Such a claim could only be predicated upon the holding in the *Ulmer* case that the title never passed out of the bank.

vene and to file their answer and cross petition (QTR 21, 1, 25-33). All of the parties indispensable to a complete, valid and binding decree were then present, but the Successor Trustee moved to strike the petitioners' answer on the ground that they were not necessary or proper parties (QTR 45-46), and such motion was granted (QTR 10), although no similar effort was made to dismiss the other group of beneficiaries, who admitted the validity of the trust.

After the answer was stricken, the court issued its decree *pro confesso*, quieting title in the Successor Trustee (QTR 6-11)[10] and although the petitioners were no longer in the case, enjoined them from setting up any claim adverse to the Trustee's title (QTR 11).

The due process clause of the Federal Constitution requires an opportunity to be heard. *Truax vs. Corrigan*, 257 U. S. 312, 66 L. Ed. 254, 42 S. Ct. 124 (1921); *Brinkerhoff-Faris Company vs. Hill*, 281 U. S. 673, 74 L. Ed. 1107, 50 S. Ct. 451 (1930).

> "The due process clause requires that every man shall have the protection of his day in court and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously but upon inquiry, and renders judgment only after trial. * * *" *Truax vs. Corrigan, supra*, 332, 263, 129.

Striking an answer from the files and rendering judgment by default is a denial of due process. *McVeigh vs. U. S.*, 78 U. S. (11 Wall.) 259, 20 L. Ed. 80 (1870); *Windsor vs. McVeigh*, 93 U. S. 274, 23 L. Ed. 914 (1876); *Hovey vs.*

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[10] In the decree quieting title the court found that neither The Union Trust Company nor the Superintendent of Banks had any "interest in the said premises" (QTR 9) and that the Successor Trustee was the "owner in fee simple" (QTR 7). The court ordered "title" to be quieted in the Successor Trustee as against The Union Trust Company and the Superintendent of Banks (QTR 6-11). The decree thus purportedly determined that the trust was valid.

*Elliott*, 167 U. S. 409, 42 L. Ed. 215 (1897); *Restatement of Law of Judgments*, American Law Institute, Section 6f.

In *Windsor vs. McVeigh*, 93 U. S. 274, 23 L. Ed. 914 (1876), McVeigh sued in Ejectment to recover his land, which the U. S. had acquired in a libel suit and conveyed to Windsor. The libel suit was predicated on an Act of Congress, July 17, 1862, to seize and confiscate property of persons who had performed certain designated acts of rebellion. The District Court of Virginia in which the libel was filed, published a monition and notice in response to which McVeigh entered an appearance and filed an answer, claiming he was entitled to the property. A motion to strike his answer on the ground that he was a rebel was granted and a decree *pro confesso* issued. This Court held that the judgment was void, as violative of due process. In its opinion, the court, speaking through Mr. Justice Field, stated, at pages 278, 916:

> "It is difficult to speak of a decree thus rendered with moderation; it was, in fact, a mere arbitrary edict, clothed in the form of a judicial sentence. * * * The denial to a party in such a case of the right to appear is in legal effect the recall of the citation to him."

Commenting upon the fact that the court invited McVeigh to file an answer but after it was filed, struck it from the files, the court said, at pages 278, 916:

> "It would be like saying to a party, Appear, and you shall be heard; and, when he has appeared, saying, Your appearance shall not be recognized and you shall not be heard. In the present case, the District Court not only in effect said this, but immediately added a decree in condemnation. * * *"

The foregoing language is directly applicable to the case at bar in which the court, after giving permission to the petitioners to file an answer, struck the answer from the files and issued the decree.

This Court had occasion to consider the same question and reached the same conclusion in *Hovey vs. Elliott*, 167 U. S. 409, 17 S. Ct. 841, 42 L. Ed. 215 (1897), in a case where a party's answer was stricken and a default judgment entered against him because he refused to obey an order of the court to deposit certain moneys with the court.

Expelling the petitioners from the trial while at the same time permitting another group of beneficiaries, who had taken a contrary position, to participate therein, brings this case within the purview of another decision of this Court in which it was held that such action was a violation of due process. *Hansberry vs. Lee*, 311 U. S. 32, 85 L. Ed. 22, 61 S. Ct. 115 (1940). Here, a group of landowners, purporting to represent 500 landowners of a certain area, brought suit to enforce a restrictive covenant against sale or lease to any member of the colored race. Hansberry, a member of that race, who had purchased land within the area, was not made a party. The restrictive agreement required 95% of the frontage landowners to sign it before it became valid. The Supreme Court of Illinois held the agreement was valid. Subsequently, Hansberry litigated the question in the Federal courts where it was held that the judgment in the state court was *res judicata* of the question of the validity of the agreement. This Court reversed the judgment, holding that due process was violated and the judgment void, since the members of the class maintaining a contrary position had not been made parties to the case. The case was remanded to the state court to allow Hansberry the right to be heard on the validity of the agreement. At pages 45, 29, this Court, speaking through Mr. Justice Stone, said:

> "Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires. The

doctrine of representation of absent parties in a class suit has not hitherto been thought to go so far."

To the same effect are *Smith, et al., vs. Swornstedt*, 57 U. S. (16 How.) 288, 14 L. Ed. 942 (1853) and *McArthur vs. Scott*, 113 U. S. 340, 5 S. Ct. 652, 28 L. Ed. 1015 (1885).

Most of the due process cases decided by this Court, involving the denial of a hearing, are not direct appeals from the initial action in which the hearing was denied, but are appeals from a subsequent attempt to enforce the judgment in the original action. *Windsor vs. McVeigh, supra*; *Hansberry vs. Lee, supra*; *McArthur vs. Scott, supra.* This Court has, however, exercised jurisdiction in direct appeals from the initial judgment in which due process was denied and has held that it is not necessary to wait for an attempt to enforce the judgment. *Riverside & Dan River Cotton Mills vs. Menefee*, 237 U. S. 189, 59 L. Ed. 910, 35 S. Ct. 579 (1915).

The instant case, however, is on all fours with those in which an attempt to *enforce* the initial void judgment was the subject of appeal. The injunction against the petitioners from asserting any claim adverse to the Successor Trustee's title was an attempt by the court to enforce the decree quieting title fully as much as a subsequent judgment holding the quiet title decree *res judicata* or entitled to full faith and credit. In the instant matter, however, the injunction is much more oppressive than the ordinary *res judicata* judgment, for it imposes upon the party a threat of imprisonment if he attempts to litigate the question.

**B. The Failure of the Ohio Courts to Accord to the Beneficiaries Any Remedy Adjudicating the Validity of the Trust, Leaving Their Property Rights Insecure and in Peril, Was a Denial of Due Process and in Conflict with Decisions of This Court.**

In all of the litigation, beginning with the initial case of *Stanley vs. Hart*, the certificate holders urged the courts to pass upon the validity of the trust, but the Superintendent of Banks and Successor Trustee resisted it. In the *Hart* and *Cook* cases they stated it was not "necessary" to determine the validity of the trust, and the courts declined to adjudicate that question. When, in the hearing before the Ohio Supreme Court in the *Cook* case, Bell, *J.*, stated from the Bench that the issue of validity would have to be determined and asked counsel for the Superintendent in what forum it would be determined, counsel answered that it could be decided in a declaratory judgment action brought by the petitioners. Yet, when the petitioners filed the Declaratory Judgment action promptly after the decision in the *Cook* case, the same counsel demurred on the ground that the certificate holders were not entitled to such a determination.

When the Successor Trustee filed its Quiet Title suit, the beneficiaries again attempted to have the validity of the trust judicially determined by joining issue with the Successor Trustee and by filing a cross petition asserting invalidity (QTR 25-33). The demurrers to the petition in the Declaratory Judgment action and to the cross petition in the Quiet Title suit were sustained and the answer of the beneficiaries stricken. Then they were enjoined from ever again raising the question (QTR 6-11 and DJR 4-5).

Thus there has been no determination of the validity of the trust. While the court in the Quiet Title suit issued a decree quieting title which, on its face, impliedly determined the trust to be valid, the court rendered the decree ineffectual by expelling the beneficiaries from the case and

denying them a hearing. The absence of these necessary parties in the hearing on the merits made the decree void and subjected it to collateral attack. (*Ante*, pages 19-21, where are cited and discussed *McVeigh vs. U. S.*, *Windsor vs. McVeigh*, *Hovey vs. Elliott*, *Hansberry vs. Lee*, and other cases.)

As said in the *Restatement of the Law of Judgments*, American Law Institute, Section 6f:

> "Thus, if the court arbitrarily strikes out any answer which the defendant makes to the claim and renders judgment against him, the judgment is void."

As if to make certain that the validity of the trust was *not* determined, the Court of Appeals said in its opinion:

> "Nothing in the petition to quiet title can be found requiring any adjudication of the validity of the trust." (QTR 77.)

And:

> "Accordingly, the court in these cases is not required to pass upon the validity or invalidity of the trust of August 15, 1924. * * *" (QTR 81.)

Thus, even if the decree were valid and binding, a future court might well hold that it did not determine validity since the petition did not *expressly* raise the issue, since the decree did not *expressly* adjudicate the issue, and since the court *expressly* stated that the issue was not involved. (*U. S. National Bank of Vale vs. Shehan*, 98 Ore. 155, 193 Pac. 658 (1920); *State vs. Bank of Commerce*, 96 Tenn. 591, 36 S. W. 719 (1896); *Re Sanford Fork & Tool Company*, 160 U. S. 247, 40 L. Ed. 414, 16 S. Ct. 291 (1895).)

The failure of the court to determine the issue of validity on the amended petition of the beneficiaries in the Declaratory Judgment action was a denial of due process, particularly in view of the fact that the courts had refused to determine the issue in the previous litigation and did not determine it in the Quiet Title suit.

A party's right to sue in a court having jurisdiction of the parties and cause of action, includes the right to prosecute his claim to judgment. *Washington-Southern Navigation Company vs. Baltimore & Philadelphia Steamboat Company*, 263 U. S. 629, 635, 68 L. Ed. 480, 44 S. Ct. 220 (1924); *McClellan vs. Carland*, 217 U. S. 268, 281, 30 S. Ct. 501, 54 L. Ed. 762 (1910).

Where a party has filed suit for a determination of his property rights and the court has jurisdiction of the parties and subject matter, it is the duty of the court to proceed to judgment and a writ of mandamus will issue if the court stays the proceeding to permit the defendant to file and prosecute an independent suit involving the identical question and parties. *McClellan vs. Carland, supra.*

The state courts must, under the Federal due process clause, afford a party a remedy for a determination of his rights. *Marino vs. Ragen*, 332 U. S. 561, 92 L. Ed. 203 (1947); *Brinkerhoff-Faris Company vs. Hill*, 281 U. S. 673, 50 S. Ct. 451, 74 L. Ed. 1107 (1930); *Lee Van Woods vs. Nierstheimer*, 328 U. S. 211, 90 L. Ed. 1177, 66 S. Ct. 996 (1946).

In the *Brinkerhoff* case, a bank sought to enjoin an assessment of its stock at 100% value while assessing other property at only 75%. The Missouri Supreme Court affirmed a judgment dismissing the petition on the ground that the bank was guilty of laches because it had failed to complain to the tax commission. Earlier Missouri Supreme Court decisions had held that the tax commission had no authority to hear such cases. Reversing the Missouri Supreme Court, this Court, speaking through Mr. Justice Brandeis, said:

> "We are of the opinion that the judgment of the Supreme Court of Missouri must be reversed, because it is denying to the plaintiff due process of law, using that term in its primary sense, of an opportunity to

be heard and to defend its substantive right." (678), (1112)

"First, it is plain that the practical effect of the judgment of the Missouri court is to deprive the plaintiff of property without affording it at any time an opportunity to be heard in its defense." (678), (1112)

"Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." (682), (1114)

In the case of *Marino vs. Ragen, supra,* decided last term, this Court held that a procedural labyrinth of inadequate remedies in state courts constitutes a denial of due process. In the instant matter, the beneficiaries have sought, by four separate forms of remedy, a determination of the validity of the trust:

(1) A suit in Equity to set aside the trust.

(2) A suit in mandamus to compel the Superintendent of Banks to set aside the trust.

(3) A suit for a declaratory judgment.

(4) An answer and cross petition in the Quiet Title suit brought by the Successor Trustee.

The issue has not yet been decided. If any further remedy be available to the petitioners, they cannot utilize it, for they have been enjoined from doing so.

So long as the courts fail to adjudicate the validity of the trust, the property rights of the beneficiaries must remain insecure, depressed in value and restricted in marketability. And if the issue is not determined before the liquidation of The Union Trust Company is completed, and this is close at hand, the beneficiaries are in danger of losing, by a declaration of invalidity, not only their property, but also any recourse they may have against the bank.

**C. Analysis of Ohio Courts' Opinions.**

The opinions are silent upon the court's action in striking the petitioners' answer nor are any grounds assigned for the issuance of the injunction.

The rationale of the court in sustaining the demurrers to the amended petition in the Declaratory Judgment action is based upon three premises:

(1) If the court determined the validity of the trust, it would have to hold it invalid.

(2) If held invalid, no benefit would accrue to the beneficiaries because they were barred under the *Hart* decision from recovery as general creditors of the bank.

(3) Since no benefit would accrue to them from a declaratory judgment, they were not entitled to a judgment.

Thus, the Common Pleas Court said, after stating that the certificate holders, as a result of the *Hart* decision, were barred from recovery as creditors of the bank:

> "It therefore appears to the court that the matter of the validity or invalidity of the trust is now an abstract and academic question, and as such is not subject to the action of a court of justice." (DJR 81.)

And the Court of Appeals, after commenting upon the fact that the beneficiaries were barred from recovery as creditors:

> "Accordingly the court in these cases is not required to pass upon the validity or invalidity of the trust of August 15, 1924, as no rights can depend upon such adjudication." (DJR 91.)

Notwithstanding these statements that the matter of the validity or invalidity was an abstract question and not subject to the action of a court of justice and that the court was not required to pass upon the question as no rights could depend upon such adjudication,—the court proceeded, in the Quiet Title action, to adjudicate the question.

Notwithstanding the inescapable premise of the court's reasoning,—that the court would have to decide the trust to be *invalid*, if it decided the question at all,—the court proceeded in the Quiet Title action to decide the trust *valid* (although ineffectually), by decreeing title good in the trustee.

The ground upon which the court denied the beneficiaries a determination of validity,—the decision in the *Hart* case barring them from recovery as general creditors of The Union Trust Company,—was the very reason which made it imperative for them to have a determination, for the protection of their rights. In the *Hart* case, the beneficiaries had been told they could not recover the purchase money for the property, but had not been told that the property was theirs, and they were in danger of losing both. Their property rights were in a state of legal paralysis which only a court could remedy by a determination of validity or invalidity. If the determination were "valid," their property rights would be secure and they would be able to market them at their fair value. If the determination were "invalid," they would have the opportunity to assert whatever rights they had against The Union Trust Company before its assets were entirely dissipated.

The *Hart* judgment did not necessarily preclude them from asserting rights against The Union Trust Company *after* a declaration of invalidity of the trust. It is a general rule of law that a right based upon the invalidity of an instrument or deed does not ripen into a claim subject to a statute of limitations until there has been a judicial determination of the invalidity of the instrument or deed.[11]

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[11] Deeds: *Garber's Administrator vs. Armentrout*, 73 Va. (32 Grattan) 235 (1879); *Beaty vs. Cruce*, 200 Mo. App. 199, 204 S. W. 553 (1918); *Johnson vs. Barnes*, 8 Ky. L. R. 956, 4 S. W. 176 (1887); *Elling vs. Harrington*, 17 Mont. 322, 42 Pac. 851 (1895). Bonds: *Gulf Life Insurance Company vs. Hillsborough County*, 129 Fla. 98, 176 S. 72 (1937); *Nuveen vs. Quincy*, 115

*(Continued on following page)*

Since the cause of action does not arise until after a declaration of invalidity, the bar period of a special statute of limitations such as the McIntyre Act would begin to run only from that time, if at all.[12]

If, as a result of a declaration of invalidity, the Successor Trustee had to reconvey the property to The Union Trust Company, the bank would be unjustly enriched, having both the property and the purchase money. Under such circumstances, Equity would give relief against the legal bar of the non-claim statute. Indeed, since the unjust enrichment would not take place until the actual return of the property to the bank, the claim based on unjust enrichment would not accrue until then, and the bar period of the special statute of limitations would begin to run only from that time, if at all.

If the Ohio courts, after a declaration of invalidity, held that the beneficiaries of the trust had no relief whatsoever, that they lost their property and could not recover from the bank by reason of the three-month bar of the McIntyre Act, the beneficiaries would be in a position to assert that the statute, so construed, is unconstitutional. Beneficiaries of such trusts are generally, as in the instant case, numerous, scattered and in no position to ascertain the facts, in order to assert a claim. They are the innocent parties whom the courts seek to protect in these transactions. On the other hand, the bank creating the trust is

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*(Continued from preceding page)*

Fla. 510, 156 S. 153 (1934); *Gillespie vs. Yell County*, 124 Fed. (2d) 632, C. C. A. 8 (1942); *Coffin vs. Board of Commissioners*, 114 Fed. 518, Aff'd. 126 Fed. 689, C. C. A. 8 (1903). Tax Sale Certificates: *Caruthers vs. Greer*, 92 Ark. 167, 122 S. W. 629 (1909); *Shea vs. Owyhee County*, 66 Idaho 159, 156 Pac. (2d) 331 (1945); *In re Harris*, 33 N. Y. S. 1102, Aff'd. 36 N. Y. S. 29 (1895); *Meriweather vs. Board of County Commissioners*, 150 Okla. 223, 1 Pac. (2d) 390 (1931).

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[12] *Zollman, Banks & Banking*, 1945 Supp., Sec. 6501; *Leal vs. Westchester Trust Company*, 279 N. Y. 25, 17 N. E. (2d) 673 (1938).

the guilty party, a violator of public policy and fair dealing. *Ulmer vs. Fulton, supra.* To construe the McIntyre Act to deprive the beneficiaries of both their property and their purchase money and to award both to the bank would raise a serious question of federal constitutionality.

Due process required that the court put an end to the uncertainty of the beneficiaries' property rights by determining whether the trust was valid or invalid. If valid, they would have been assured of their equitable ownership of the property. If invalid, and the court held that they had neither their property nor any rights against The Union Trust Company, they would have had the opportunity to appeal to this Court to test the constitutionality of a non-claim statute so harshly construed.

**D. A Judicial Determination of the Validity or Invalidity of the Trust Is Necessary to Prevent Continued Impairment and Possible Total Loss of Beneficiaries' Property Rights.**

The record is convincing that the validity of this trust is in doubt, seriously affecting the value and marketability of the beneficiaries' property rights and placing them in the peril of losing both the property and the purchase money as The Union Trust Company approaches the end of its liquidation.

In four separate lawsuits since 1942, the courts have refused to adjudicate the validity of the trust, finally enjoining the beneficiaries from any further attempt. When, in the Quiet Title suit, the court had all the necessary parties before it and had the opportunity to render a valid, binding judgment, it destroyed that opportunity by striking the answer of the petitioners and issuing a default decree quieting title. To make certain that the decree, which on its face necessarily determined validity, should *not* have that effect, the Court of Appeals expressly stated that the issue of validity was not involved,—and, therefore, not adjudicated.

Whenever they were confronted with the question of the validity of this trust, the judges of Ohio, like Pilate, when confronted with the question "What is Truth?" pulled up their robes and scurried from the judgment halls. St. John, Chapter XVIII, Verse 38.

The validity of this trust and the title to the trust property and the land trust certificates must always remain in doubt and insecure until there has been a full hearing of the issue in which all parties affected by the judgment have had their day in court, in person or by proper representation. This should take place before The Union Trust Company is entirely liquidated, so that if it is held that the trust is invalid, the beneficiaries may be able to enforce whatever rights they have against the bank.

Since the petitioners have been enjoined from taking any further proceedings, the only relief left to the beneficiaries of this trust is a review by this Court and an order that will insure a judicial determination of validity.

Respectfully submitted,

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## APPENDIX A.

### The McIntyre Act.

GENERAL CODE SECTION 710-92a.

Effective April 21, 1937.

§ 710-92a. Presentation and proof of non-book claims.

At any time subsequent to the expiration of the date for filing claims as fixed by the superintendent of banks, pursuant to the provisions of section 710-90 of the General Code, he may give notice by publication once a week for four consecutive weeks in a newspaper of general circulation in the county in which the principal office of such bank is located, requiring the presentation and proof of all general claims not filed and not appearing upon the books of the bank, at a place and time to be fixed in such notice, which time shall be not less than 60 days subsequent to the date of the last publication of such notice.

All claims not filed in accordance with the provisions hereof shall be forever barred from participation in any of the assets of such bank, and such notice shall so state. (117 v. 250, § 1. Eff. Apr. 21, 1937.)